

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JEROME REYNOLDS,

Defendant-Appellant.

UNPUBLISHED

March 4, 2004

No. 245140

Saginaw Circuit Court

LC No. 02-021268-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant David Jerome Reynolds was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive sentences of two years' imprisonment for felony-firearm and 85 to 240 months' imprisonment for the armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting evidence regarding gangs and the perpetrator's possible gang affiliation. We review questions concerning the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists where "an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 256 (2002).

The admissibility of evidence depends on its relevance. See *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995). "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may, however, be excluded pursuant to MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

While the evidence at issue was arguably more prejudicial than probative, it was not outcome determinative. Therefore, reversal is not warranted. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next argues that the prosecutor's actions denied him a fair trial. We review preserved instances of alleged prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 132 (2001). We do not consider the unpreserved instances of prosecutorial misconduct here because defendant fails to show that he was prejudiced by the misconduct alleged. See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

With respect to the preserved issues, questions involving allegations of prosecutorial misconduct are reviewed case by case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). The alleged misconduct is considered in light of all of the facts of the case and in the context of all the remarks the prosecutor made. *Id.* The prosecutor's comments are also examined in light of the defense's arguments and the evidence presented at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Prosecutorial misconduct exists where the prosecutor's actions denied the defendant a fair and impartial trial. *Howard, supra* at 544.

Defendant argues that the prosecutor engaged in misconduct when he asked witnesses questions that defendant alleges were prejudicial. Defendant also argues that the prosecutor engaged in misconduct by making a closing argument remark that defendant's alibi witness was drunk on the night of the robbery or was lying about what happened that night. Prosecutorial misconduct cannot be based on a prosecutor's good-faith effort to attempt to introduce evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). And the prosecutor's comment on the witness's credibility was permissible. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). Therefore, a finding of prosecutorial misconduct is not warranted on this basis.

Defendant next argues that there was insufficient evidence to convict him of felony-firearm and to identify him as the armed robber. We review a claim of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Evidence is viewed "in a light most favorable to the prosecution" to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW 748 (1992). All conflicts must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove a defendant guilty of felony-firearm, the prosecution must prove that the defendant possessed a firearm during the commission of a felony. MCL 750.227b; see *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). Here, the victim gave a fairly detailed description of the handgun that defendant pointed to her head while tearing off her necklace and taking cash from her pocket. A second witness also saw the gun. Therefore, a rational trier of fact could have reasonably concluded that defendant possessed a weapon while committing the felony of armed robbery. *Wolfe, supra* at 515; *Terry, supra* at 452.

Turning to the armed robbery conviction, this Court has held that witness identification of a perpetrator can be sufficient evidence to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). And it is well settled that the credibility of identification testimony is properly left to the trier of fact. *Id.* We find defendant's conviction adequately supported by the testimony of the victim—who was previously acquainted with defendant—and her grandmother, who witnessed the armed robbery.

Defendant next contends that his sentence was disproportionate. However, defendant does not allege that the trial court erred in calculating his scores or that the court relied on inaccurate information. Therefore, review is precluded. MCL 769.34(10).

Defendant next argues that he was denied effective assistance of counsel. This issue is not preserved for appeal, so our review is limited to mistakes apparent on the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1992).

To show ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and that " 'but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Here, defendant fails to overcome the strong presumption of effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2502; 80 L Ed 2d 674 (1984). Moreover, even if counsel had performed precisely as defendant contends counsel should have performed, the victim and an eyewitness were acquainted with defendant and unquestionably identified him as the perpetrator. Therefore, a finding of ineffective assistance is not warranted.

We do not consider defendant's claim that MCL 769.10(34) is unconstitutional because our Supreme Court has rejected this argument. *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad